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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ITEL CONTAINERS INTERNATIONAL CORPORATION,
Petitioner,

v.

JOE HUDDLESTON, COMMISSIONER OF REVENUE,
STATE OF TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Tennessee

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BRIEF OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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This brief *amicus curiae* is submitted with the written consent of counsel to both parties filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The United Kingdom of Great Britain and Northern Ireland is a major trading partner of the United States. Its imports of $22.1 billion of U.S. merchandise in 1991

rank it as the largest European market for U.S. exports and the fourth largest worldwide (after Canada, Japan and Mexico); it exported $18.5 billion of general merchandise to the United States in 1991.[1] Over 98% of the United Kingdom's import/export trade with the United States, in terms of weight, is shipped in ocean-borne commerce;[2] the balance is shipped by air. General merchandise, by and large, is containerized—that is, carried in marine or air cargo containers.[3] About half of the marine containers utilized by international ocean carriers, including container lines domiciled in the United Kingdom, are leased from equipment lessors rather than owned by the carriers themselves. While some air cargo containers are leased by airlines, most are carrier-owned.

The United States is party to the 1956 Customs Convention on Containers and the 1972 convention of the same name.[4] The United Kingdom is party only to the 1956 Convention ("Convention"); therefore, that Convention controls relations between the United Kingdom and the United States on its subject matter. The purpose and structure of the two Conventions is virtually identical: "to develop and to facilitate the use of containers in international traffic"[5] by setting forth rules on the "uniform

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[1] Foreign Trade Division, Bureau of Census, U.S. Department of Commerce. Accord: Statistics of HM Customs and Excise.

[2] *Id.*

[3] In 1991, 3,101,250 tons of containerized cargo were carried between the United States and the United Kingdom, having a value of approximately $13 billion. Statistics of HM Customs and Excise.

[4] Customs Convention on Containers, May 18, 1956, 20 U.S.T. 301, TIAS 6634, 338 U.N.T.S. 103 (entered into force in U.S. on March 3, 1969, entered into force in United Kingdom on August 4, 1959); Customs Convention on Containers, Dec. 2, 1972, 988 U.N.T.S. 43 (entered into force in U.S. on May 12, 1985) ("1972 Convention").

[5] 1956 Convention, preamble. *See* 1972 Convention, preamble, which uses practically the same terms.

treatment of containers used exclusively in foreign commerce."[6]

Her Majesty's Government ("HMG"), a principal architect of the Convention, became a party in order, among other things, to prevent the imposition of duties and taxes on the free flow of containers dedicated to international commerce. With the advent of containerization in the 1950's, it was recognized that a dedicated marine or air cargo container could well traverse trade lanes across the globe many times over during the course of its economic life, especially a leased container since it would likely be utilized by several international carriers over the course of its life. Without the undertakings of governments in a multilateral treaty such as the Convention, the nations of the world (including their political subdivisions) would be free to seize upon any aspect, use or change of possession of an international cargo container to raise revenue, but also to frustrate commerce.

HMG files this brief to apprise the Court of its views regarding the Convention, not to argue the meaning of the United States Constitution. The Tennessee Supreme Court[7] appears to have paid scant attention to the Convention, concluding without explanation that since Tennessee's tax is imposed on a discrete transaction occurring only in Tennessee, the "tax will not hinder the policies embodied in the . . . Convention . . .;"[8] the Convention is not mentioned at all in the Tennessee lower court decision.[9]

HMG considers Tennessee's 5.5% tax on the proceeds of international-commerce container leases as one proscribed by the Convention. Major trading nations that

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[6] *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 452 (1979) ("*Japan Line*") (referring to 1956 Convention).

[7] The decisions of the Tennessee Supreme Court, reported at 814 S.W.2d 29 (Tenn. 1991), and the Tennessee Chancery Court, 20th Judicial District, are reproduced in the Appendix, at 1a-26a, attached to the Petition for a Writ of Certiorari (hereinafter "Pet. App.").

[8] Pet. App. at 16a.

[9] Pet. App. at 19a-23a.

are party to either the Convention or the 1972 Convention have expressed their grave concern to the United States Government over the incompatibility of the Tennessee tax with undertakings under the Conventions. *See* Appendix.

The importance of this case is not limited to Tennessee's tax; if the tax survives petitioner's challenge, the many other states that have enacted (or might enact) sales tax legislation will almost certainly follow suit, creating in effect a patchwork, almost-national U.S. sales tax on container-lease revenue. HMG believes that the application of U.S. state taxes to the lease proceeds of containers dedicated to international commerce, and the inevitable adverse reaction of the non-U.S. signatories to the Convention (or *their* political subdivisions), will deal a severe blow to the smooth functioning of international cargo carriage. With respect to the United Kingdom in particular, such application will place undue burdens on U.K. shipping lines, and on the U.S. and U.K. customers (importers and exporters) of all shipping lines serving the trade between the U.S. and the U.K.

A ruling in favor of petitioner would remove a threat to the practice of trading nations for some 36 years during which Convention signatories have uniformly abided by the Convention's stricture to refrain from imposing taxes such as Tennessee's. Such a ruling would also reaffirm this Court's view that in regard to the United States the Convention "reflects a national policy to remove impediments to the use of containers as 'instrumentalities of international traffic.'" *Japan Line*, 441 U.S. at 453.

SUMMARY OF ARGUMENT

The Convention's prohibition on taxation applies to the political subdivisions of signatory nations just as forcefully as to the signatories themselves. The tax assessed by Tennessee on international container leases is covered by the plain terms of the Convention which proscribe all taxes whatsoever chargeable by reason of importation. The presence of a container in Tennessee is precisely

due to its temporary importation under the admissions standards of the Convention; that is, it is in Tennessee by reason of importation. Consistent with the dictates of the Convention, the United Kingdom and other nations have exempted from taxation the lease of temporarily imported international-commerce containers.

Throughout the existence of the Convention, no signatory nation has imposed national taxes on the lease of containers in international commerce, and until now no political subdivision of a signatory has done so. The uniform practice of signatories not to tax international container leases has been no mere coincidence; rather, it results from a common and reciprocal understanding of the Convention's reach. If the Convention were uniformly read the way Tennessee reads it, the leasing of international containers predictably would be burdened not only by Tennessee's tax but by other U.S. states' and nations' taxes. The United Kingdom and other signatories are not likely to tolerate a situation in which they refrain from imposing taxes on container leases due to their understanding of their Convention obligations, while a political subdivision of another signatory imposes its tax despite the Convention.

ARGUMENT

The Convention does not distinguish between national and subnational taxation. The phrase "all . . . taxes whatsoever" in Article 1(a) leaves no doubt that a tax contravening the Convention if imposed on a national level by a Contracting Party would also contravene the Convention if imposed by a political subdivision of a Contracting Party. The clear undertaking of each Contracting Party (including, of course, the United States) is that proscribed taxes are proscribed regardless of the level of taxation within a contracting state. This case is therefore different from *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986), wherein this Court, after reviewing pertinent international agree-

ments, found that those agreements expressly prohibited only national sales taxes on aviation fuel and that in consequence the United States Government had "affirmatively decided to permit the States to impose these sales taxes on aviation fuel." *Wardair* at 12. There is no language in the Convention suggesting that its coverage is restricted to national taxation, nor is HMG aware of any other indicia of such restriction.

Only two general reasons—neither of which seems to rely on any argument that the Convention forbids only national taxes and not taxes imposed by political subdivisions—have been proffered in support of the proposition that the Convention does not preclude Tennessee's tax on international-commerce container leases: (1) that the Convention is inapplicable because it does not reach "the discrete transaction of the transfer of possession of leased cargo containers in Tennessee," [10] and (2) that the Convention relates only to customs duties on containers.[11] Neither of these reasons for escaping the reach of the Convention is valid in HMG's view, and both take an impermissibly narrow view of the Convention's scope.

As to the first, the Convention would be irremediably eviscerated by such reasoning since any aspect of international container commerce (the entry into a lease, payment of rent, acceptance of possession, utilization, and so on) could be characterized by a taxing authority as being discrete in order to avoid the Convention. The real question is whether a tax places a burden on the free flow of containers that the Convention is meant to ensure; Tennessee's tax plainly does.

The second reason simply ignores the unambiguous language defining the Convention's tax prohibition.

[10] Pet. App. at 16a; *accord*, Brief in Opposition to the Petition at 8 (filed Sept. 20, 1991) (hereinafter "Tenn. Br.").

[11] Amicus Curiae Brief for the United States at 9 (filed Jan. 23, 1992); Tenn. Br. at 7 ("[T]he Tennessee tax simply is not levied on imports, but is a generally applicable sales tax").

Rather, the Convention reaches broadly to embrace "not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation." Article 1(a).

International-commerce containers leased while in Tennessee are there precisely "by reason of importation," having entered the U.S. in the course of their continuous use in the cross-border commerce that the Convention is designed to facilitate. The presence of a marine container, for example, in Tennessee is due to its "temporary admission" into the United States under Article 3 of the Convention, which allows entry of a container into the territory of a Contracting Party for only a limited time (up to three months) before it once again embarks on a journey on the high seas *en route* to the territory of another Contracting Party. In other words, the container is in Tennessee only by reason of the fact that it has been imported as an international-commerce container, *i.e.*, "by reason of importation."

The fact that Tennessee's sales tax is assessed on the lease payments made for the container rather than on the container itself does not make the tax any more permissible under the Convention's terms or any less intrusive upon the declared purpose of the Convention. A transaction tax levied at any one point during the course of a container's journey in a continuous loop of international trade results in the same degree of interference with containerized commerce that would attend the assessment of a customs duty—which is why the Convention's drafters expressly prohibited "not only Customs duties" but any "taxes whatsoever chargeable" by reason of a container's temporary importation.[12]

Since its inception, the Convention has been consistently interpreted by the United Kingdom to prohibit the as-

[12] The burden that the tax imposes on international commerce is underscored by the fact that the tax is measured by the number of days that the container is leased for use in international commerce. In fact, a container so leased might well never again enter Tennessee (or any other state) during its lease term.

sessment of a tax such as that imposed by Tennessee on international-commerce containers temporarily imported into the United Kingdom. The United Kingdom's national analogue to Tennessee's sales tax is called the Value Added Tax ("VAT"). The VAT applies to the supply of most goods and services (including the service of equipment leasing) at a standard rate of 17.5%.[13] While the VAT is assessed against lease payments made for containers that are used in domestic commerce within the United Kingdom, with respect to *international*-commerce containers the United Kingdom has implemented the Convention to relieve them from the VAT.[14] Thus, HMG views the Convention as precluding the United Kingdom from imposing the 17.5% VAT in circumstances analogous to those under which Tennessee imposes its sales tax: on the leasing of containers dedicated to international commerce while those containers are in temporary import status in the United Kingdom under Convention rules.

The structure of United Kingdom VAT taxation is essentially the same in the other eleven nations of the European Community. The VAT system of taxation has been adopted by the European Community, which has laid down a set of principles intended to harmonize the tax laws of its member nations.[15] Each EC member state im-

[13] Value Added Tax Act 1983 and predecessor statutes.

[14] The temporary importation of leased containers into the United Kingdom under Convention admission rules is exempted from the VAT by virtue of HM Customs and Excise Notice 748 (Jan. 1, 1991); the export from the U.K. of leased containers is exempt from the VAT pursuant to Regulation 50, Value Added Tax (General) Regulations 1985, S.I. 1985 No. 886; and with respect to leased containers not physically present in the United Kingdom during the lease term, the VAT is not applicable by virtue of Schedule 5, Group 10, Item 11 of the Value Added Tax Act 1983. Similar exemptions have been applied in respect of the VAT and its predecessor tax since the U.K. became party to the Convention.

[15] Sixth Council Directive 77/388/EEC of May 17, 1977 (OJ No. L145, June 13, 1977) ("Sixth Directive").

poses the harmonized VAT and each is bound to implement an exemption from the VAT for international-commerce containers present in that member state under temporary importation arrangements.[16] Like the EC nations, other signatories to either the Convention or the 1972 Convention do not impose a national sales, use, VAT or similar tax on international container leases (insofar as HMG is aware), and until Tennessee did so, no political subdivision of a signatory assessed any such tax.

Those arguing that the Convention is not applicable to Tennessee's tax would have this Court believe that the uniform decision by the signatories of both Conventions to refrain from imposing national sales, use, VAT or similar taxes on international container leases is mere coincidence, not because the Conventions proscribe such taxation. That is not plausible. The long-standing and consistent practice of the signatory states in not imposing such taxation speaks persuasively, HMG believes, to the import and meaning of these multilateral Conventions. The Diplomatic Note transmitted to the Government of the United States by a number of governments, a copy of which is appended to this brief, underscores the point. The major overseas trading partners of the United States view Tennessee's assessment of tax as an unprecedented departure from the no-tax rule of the Conventions.[17]

Because the Convention does not distinguish between national taxes imposed by signatories and taxes imposed by their political subdivisions (as noted at the outset), the view that the Tennessee tax is of a type not covered by the Convention must necessarily mean that the national

[16] Article 14(1)(c), (i) and Article 15(13) of the Sixth Directive. It is the Convention, of course, that sets forth the multilateral regime for temporary admission; it is also the Convention which clearly speaks to the taxation of temporarily-admitted containers.

[17] The governments joining the attached Diplomatic Note are the Governments of Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, Norway, Spain, Sweden and the United Kingdom.

imposition of such a tax would also fall outside the Convention's cover. It therefore seems to HMG that proponents of the propriety of Tennessee's tax believe that the United States could enact *federal* sales tax legislation applicable to international-commerce container leases without violating its Convention undertakings to other nations, a belief so directly at odds with the signatories' uniform practice of not imposing any national taxes on international container leases that it brings the central issue in this case into sharper focus. (Of course, if Tennessee's assessment is declared valid, other U.S. states with sales taxes would almost certainly also apply them in the same manner; that would be tantamount to a national sales tax in any event.)

HMG envisages that international chaos in container procurement, and consequent impairment of international trade, would result if all signatories felt themselves relieved of Convention restraints on taxation due to a major Contracting Party's position in respect of a tax assessed by one of its political subdivisions. The overlapping burdens resulting from taxation by numerous jurisdictions and the likelihood of retaliatory taxation of international container leases would impose a substantial price increase on leased containers that would jeopardize their utility as instrumentalities of international commerce. Container lessors, including U.K. lessors (of which there are a number) would suffer economic injury as the advantages of leasing are dissipated by widespread taxation (*e.g.*, shipping lines would opt for owned, rather than leased, container fleets). Moreover, permitting Tennessee to tax container leases despite the Conventions would open the door for other national and subnational jurisdictions to ignore the Conventions with regard to the imposition of myriad taxes on other aspects of international container commerce unrelated to leasing.

If the United States were now to interpret the Convention other than in the manner in which it has been

uniformly implemented for decades, the United Kingdom and other nations of similar persuasion are not likely to tolerate a situation in which they refrain from imposing taxes while U.S. political subdivisions impose theirs. The fundamental principle underlying any agreement among nations is reciprocity—here, a reciprocal understanding that there will be no taxation of the sort imposed by Tennessee. If such taxation is permitted in Tennessee's case, and reciprocity is thereby destroyed, the United Kingdom (and other signatories, HMG believes) would need to consider whether continued restraint from taxation, at least in relation to the United States, is warranted.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Supreme Court of Tennessee.

Respectfully submitted,

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APPENDIX

The Governments of Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, Norway, Spain, Sweden and the United Kingdom ("the Governments") present their compliments to the Department of State and have the honour to draw the attention of the Department of State to a case in the U.S. Supreme Court, *Itel Containers International Corporation v. Joe Huddleston, Commissioner of Revenue, State of Tennessee* (Case No. 91-321). This case involves a challenge to the imposition by the State of Tennessee of a sales tax on the proceeds earned from the lease of cargo containers used in international traffic when such containers are delivered in Tennessee. If this application of the Tennessee sales tax survives the challenge before the Supreme Court, container lessors under Tennessee law would be required to collect the tax (5.5% of the lease proceeds) from container lessees which typically are international shipping companies.

The Governments are gravely concerned by Tennessee's application of its sales tax to leases of containers in international commerce. Each of the Governments is signatory to either the 1956 Customs Convention on Containers (20 U.S.T. 301) or the 1972 Customs Convention on Containers (988 U.N.T.S. 43). The Government of the United States is party to both Conventions. The Governments are of the view that the application of Tennessee's sales tax to leases of international-commerce cargo containers is in direct contravention of the Government of the United States' undertakings in these Conventions. Consistent with obligations under the Conventions, neither the Governments nor any political subdivisions impose sales taxes (or equivalent taxes of different nomenclatures) on the lease of cargo containers that are used in international commerce among the Contracting Parties to the Conventions.

The taxation by Tennessee (and predictably by many other states in the future) of international-traffic con-

tainer leases would impose an unjustified and unacceptable burden on international shipping companies and their customers. The Governments consider that the purpose of the Conventions was to preclude any such burdens on international commerce. They would request the Department of State to bring the concern felt by the Governments about the incompatibility of the Tennessee tax with undertakings under the Conventions to the attention of all interested parties of the United States Government, including those who will be formulating the position of the United States in this regard.

The Governments avail themselves of this opportunity to renew to the Department of State the assurance of their highest consideration.

WASHINGTON D.C.
28 April 1992